Supreme Court of the United States.

OCTOBER TERM, 1971.

Nos. 71-1017
71-1026

MIKE GRAVEL, UNITED STATES SENATOR,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

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Petitioner,
v.
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Supreme Court, U
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MICHAEL RODAK, JR.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

REPLY BRIEF OF SENATOR MIKE GRAVEL.

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PART I.

The Speech or Debate Clause Prohibits Grand Jury Investigation into the Legislative Acts of a Senator Through the Interrogation of Persons Who Assisted Him in the Performance of His Duties.

1. The Solicitor General has obfuscated a central issue before this Court by creating and then rebutting a non-existent claim. The Solicitor General characterizes this case as involving the question of whether the Speech or Debate Clause "extends" to protecting those who assist a senator from *accountability* for the commission of illegal acts. In fact, this matter is of absolutely no relevance to the narrow issue which is before this Court—namely, whether there is a *privilege against inquiry* under the Clause by the Executive and grand jury into a senator's privileged acts. Throughout these proceedings, Senator Gravel has never ventured a view with respect to whether or not any party with whom he dealt is "bathed" with any kind of immunity from prosecution or accountability.[1] Even assuming, *arguendo*, that an aide or printer may be held accountable for violating a criminal or civil act, see *Powell* v. *McCormack*, 395 U.S. 486 (1969), and *Kilbourn* v. *Thompson*, 103 U.S. 168 (1880), it certainly does not follow that testimony may be procured in violation of the Senator's own privilege. *United States* v. *Johnson*, 383 U.S. 169 (1966); *Ex parte Wason*, L.R. 4 Q.B. 573 (1868); *Rex* v. *Rule*, 2 K.B. 372 (1937). In this respect, the Clause operates precisely as do other testimonial privileges familiar to the courts, such as the attorney-client privilege and the priest-penitent privilege.[2] And the Executive has heretofore stressed the

[1] Consolidated brief of Senator Gravel, at 92-93.

[2] Presumably, for example, the Justice Department could obtain an indictment against Beacon Press officials without resort to questioning parties about the Senator's protected activities, since

distinction it now blurs; although assistants to the President are clearly accountable for illegal acts, the President has invoked his privilege to prevent them from testifying before congressional committees. (See Brief of Senator Gravel at 110-112.).

2. The Solicitor General argues strenuously that the privilege belongs only to senators and representatives (Brief, at 13-17, 31-38). We agree. But this begs the issue of whether the Senator's own privilege is violated when his protected activities are inquired into through an Executive and grand jury interrogation of persons who assisted him. No one would argue that the attorney-client privilege, which belongs exclusively to the client and exists for his benefit alone, could be defeated by questioning the attorney. As the Senate cogently stated in its brief *amicus curiae* (at 5);

> "For if the activities are protected as [the Solicitor General] assumes, they should be beyond inquiry."

3. The Solicitor General, while asserting the absence of historical evidence to cast light on the meaning of the Speech or Debate Clause, reasons by purported analogy from the historical development of the freedom from arrest clause (Brief, at 17-22). Apart from the fact that the two clauses appear in the same section of the Constitution,

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Beacon's publication of the Subcommittee record is a matter of public record, replete with public announcements and the readily obtainable physical document itself in four volumes. In prosecuting such an indictment, the Justice Department would, of course, be limited in its introduction of evidence by the guidelines set forth in *United States* v. *Johnson, supra,* and this Court, if faced with the question, might decide that, as in England (see Parliamentary Papers Act, 3 & 4 Vict., c. 9, and *Wason* v. *Walter,* L.R. 4 Q.B. 73 (1868)), printers of such papers are immune from criminal and civil liability. But as we have said, these difficult issues are not present in the case at bar.

they have no relation to each other. These two privileges are historically distinct. The sole purpose of the privilege from arrest was to protect members from the molestations of civil arrests emanating from suits lodged in inferior tribunals and never had any applicability to criminal proceedings. See generally, T. P. Taswell-Langmead, *English Constitutional History,* 340-348 (4th edition, 1890). The freedom of speech privilege, on the other hand, was specifically designed to preclude harassment and intimidation by the Executive. *Id.*, at 336, 340. Further, there was never any justification, in light of the limited purpose for the privilege from arrest, to "extend" the privilege to aides in order to vindicate that purpose; and this unwarranted extension was reversed by Parliament itself prior to our Revolution. See generally, C. F. Wittke, *The History of English Parliamentary Privilege,* 39-42 (1921). The abuses and checkered history of the privilege from arrest were well understood by the Framers, who severely limited its scope. *Williamson* v. *United States,* 207 U.S. 425 (1908). See *Long* v. *Ansell,* 293 U.S. 76 (1934). There is no evidence of similar abuses by the exercise of the free speech privilege, and the Framers viewed it as an essential bedrock of separation of powers. *United States* v. *Johnson,* 383 U.S. 169, 178 (1966). That aides can be arrested for robbing a bank or not paying alimony simply has no bearing upon whether they may be interrogated about how and why a senator decided to speak or vote as he did.

4. In a related manner, the Solicitor General argues that the "linguistic precision" of the Clause reveals that only senators and representatives may not be questioned before the grand jury. He reaches this result by contrasting the wording of the Clause with the subject matter wording of its predecessors in the English Bill of Rights, the Articles of Confederation and the state constitutions.

As we pointed out in our brief (at 92-93, n. 123), the Committee on Detail wrote the Clause in subject matter terms, and the present language was changed by the Committee on Style without any indication that it intended this difference to be substantive. If indeed the change were substantive, one would have expected, first, that it would have been made other than by the Committee on Style, and that the change would have provoked at least some debate. Not only was there no debate in the Convention, but an exhaustive review of the ratification debates has failed to uncover even a single comment that the Speech or Debate Clause might have a different meaning from that of its predecessors. See, *e.g.*, II *Elliot's Debates* 52-54 (1788) (Massachusetts); II *id.*, at 325, 329 (New York); II *id.*, at 550 (Maryland); III *id.*, at 73 (North Carolina); III *id.*, at 368-375 (Virginia).[3] And this Court has twice affirmed that the Clause is substantially the same as that in the English Bill of Rights. *Powell* v. *McCormack*, *supra*, at 502, n. 20; *United States* v. *Johnson*, *supra*, at 177-178.

5. In an apparent attempt to reconcile with the case at bar inconsistent positions taken by the Justice Department in prior and pending cases, see, *e.g.*, *Doe* v. *McMillan*, 442 F. 2d 879 (D.C. Cir. 1971); *Barr* v. *Matteo*, 360 U.S. 564 (1959); *Dombrowski* v. *Eastland*, 387 U.S. 82 (1967), the Solicitor General proposes that those who assisted a Senator should be absolutely immune from civil tort suits, but should be freely inquirable by the Executive and the grand jury about the Senator's privileged acts (Brief, at 24-31, 37-38). The Solicitor General apparently realizes that public policy mandates a court-made rule to protect the operation of the legislative process from unrestrained

[3] In the above debates, the Speech or Debate Clause received only cursory mention and was approved without dissent. In each of the other state debates, there is no recorded mention of the Clause.

questioning of aides in civil suits, but he refuses to recognize the much stronger, fundamental public policy which led the Framers to protect that process from unrestrained inquiry by co-ordinate but separate branches of government. As this Court said in *United States* v. *Johnson, supra,* at 181:

> "[T]he privilege was not born primarily to avoid private suits . . . but rather to prevent intimidation by the executive and accountability before a possibly hostile judiciary."

Thus, the yardstick for measuring the scope of the legislative privilege in this case is not, as suggested by the Solicitor General, to be borrowed from civil suits such as *Dombrowski* v. *Eastland, supra,* and *Powell* v. *McCormack, supra,* which speak of protecting the legislator from pocketbook loss and distraction. Rather, this Court must look to the historical purposes articulated in *United States* v. *Johnson, supra,* which speaks of preserving separation of powers and of preventing executive intimidation and harassment and hostile judicial action.

In this respect, it is of dispositive weight to note that the United States Senate, in its brief *amicus curiae,* acknowledges the *limited* application of the Clause in civil suits brought to protect individual constitutional rights, but the Senate strongly asserts the *absolute* applicability of the Clause in separation of powers cases to prevent the grand jury from being turned into an executive instrument of harassment and intimidation. (See Senate's Brief, at 9, 12-13.) As both the Senate and Senator Gravel recognize, the basic flaw in the Solicitor General's argument is that it turns the Speech or Debate Clause on its head. It would be a supreme irony for this privilege, which was designed to protect against executive intimidation and was placed

in a Constitution which obliges the courts to protect individual rights, to be construed so that the courts deny relief for the violation of secured rights but lend their assistance to the Executive in breaching the wall of separation of powers.

6. The Solicitor General asserts, without any citation of authority, that legislative assistants are not subject to the disciplinary powers of the Senate (Brief, at 9, 34). Even if supportable, the relevance of this assertion is at best dubious, inasmuch as the case at bar does not involve the accountability of such assistants. But, in fact, this assertion is not supportable; for the Senate possesses and has exercised the power to punish wayward aides and assistants of the Senate and of individual members. For example, the Senate tried and expelled its own Sergeant-at-Arms for publishing a libellous article. Senate Journal, January 10, 1933, 159-160, 172-173. Moreover, this Court has recognized that the enumerated powers of each House to make rules for its proceedings (Art. I, sec. 5) necessarily implies the power to punish anyone—member, aide, or complete outsider—who violates those rules. *Anderson* v. *Dunn*, 6 Wheat. 204 (1821); *Jurney* v. *MacCracken*, 294 U.S. 125 (1935). See *Groppi* v. *Leslie*, U.S. , 92 S.Ct. 582 (1972). In fact, in the exercise of that power, the Senate has adopted Rule 36, which specifically provides for the punishment of members and assistants who "disclose the secret or confidential business or proceedings of the Senate." *Senate Manual*, sec. 36 (1967 ed.).[4] Under this same rule, the

[4] The adoption of this standing rule resulted from the censure of Senator Benjamin Tappan of Ohio in 1844 for causing to be published in *The New York Evening Post*, a secret message from President Tyler to the Senate concerning the annexation of Texas. Subcommittee on Privileges and Elections of the Senate Committee on Rules and Administration, *Senate Election, Expulsion, and Censure Cases* (Doc. No. 71, 1962), 11-13. In at least two other

Senate has established a procedure to waive the testimonial privilege to prevent a miscarriage of justice. Thus, Rule 36 has uniformly been read to permit a Senate aide to testify in any judicial proceeding after being authorized to do so by Senate resolution. See also 2 U.S.C. § 130b (g); *United States Servicemen's Fund* v. *Eastland,* Civil No. 1474-70 (D. D.C., decided October 21, 1971, and discussed in the Solicitor General's brief at 27, n. 15).

In addition, the conduct of a person who assists a senator in the performance of his duties *is* subject to the restraints of the legislative process because the senator himself is responsible to the electorate and to his House for the conduct of such persons. Directly on point is the 1928 censure of Senator Jonathan Bingham of Connecticut who was punished by the Senate because *his aide* violated the standing rules of the Senate by being present during closed executive committee sessions and leaking confidential information to corporate officials. Subcommittee on privileges and Elections of the Senate Committee on Rules and Administration, *Senate Election, Expulsion, and Censure Cases* (Doc. No. 71, 1962, at 125-127).

In any event, we reiterate that the case at bar does not turn on or involve issues of accountability.

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memorable cases, the Senate has sat as a judicial body to determine whether members had abused the exercise of their informing function. In the case of Senator Robert M. LaFollette, the Senate dismissed a censure resolution charging disloyalty and sedition based upon a speech given before a political convention, during the First World War, because "the speech did not justify any action by the Senate." *Id.*, at 110.

In the most recent case, arising in 1954, Senator Joseph R. McCarthy of Wisconsin was charged with the "receipt or use of confidential or classified documents or other confidential information from Executive files." *Id.*, at 153.

Although Senator McCarthy was censured for other reasons, the Committee did not recommend censure on these charges because it found "mitigating circumstances." *Ibid.*

7. The Solicitor General suggests that there would be staggering consequences to law enforcement if the Executive and grand jury cannot investigate into the privileged legislative activities of congressmen. First of all, in the past 195 years of the Republic's history, there have been only a handful of cases in which the Executive and grand jury have seen fit to so much as attempt to delve into legislative activity for any purpose. The case most directly on point, the 1797 grand jury investigation of Congressman Cabell for issuing newsletters critical of the Administration's policy toward France, was condemned as a blatant violation of the Constitution. (See our brief at 53-58.)[5]

The Solicitor General's ultimate hypothetical of possible abuse is a conspiracy between a senator and others to deceive the Senate in a speech which he knows to contain false information (Brief, at 34-36). In 1868 this precise situation occurred in England and was the subject of the celebrated decision of *Ex. parte Wason*, L.R. 4 Q.B. 573, where the Queen's Bench held that no criminal proceeding, including the mere filing of an information, could be instituted against a member or outsider for such a conspiracy, for to do so would be to impugn the free speech privilege. It is now 104 years later, and England seems to have survived.[6]

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[5] See also *Lyon's Case*, Case No. 6646, 15 Fed. Cas. 1183 (C.C.D. Vt. 1798) (our brief at 64-67); *United States* v. *Johnson*, 419 F. 2d 56 (4th Cir. 1969), where the Court of Appeals stated that testimony about Johnson's speech before the grand jury had been "constitutionally impermissible"; *United States* v. *Brewster*, No. 1025, Jurisdiction Postponed, 401 U.S. 935, No. 70-45 (restored to the calendar for reargument) 40 U.S.L.W. 3351.

[6] And, if we may be permitted to observe, the decline of the Empire has never been traced to the decision in *Ex Parte Wason*.

PART II.

The Publication by a Senator of an Official Public Record of a Subcommittee, of Which He is Chairman, Critical of Executive Conduct in Foreign Relations, is Privileged From Judicial Inquiry by the Speech or Debate Clause.

8. To support his position that the publication of committee reports is not encompassed by the free speech privilege, the Solicitor General places principal historical reliance upon the 1688 case of *Rex* v. *Williams*, 13 How. St. Tr. 1370, 2 Show. K.B. 372, Com. 18, 89 Eng. Rep. 1048 (Brief, at 46-47). However, as we discussed in detail in our brief (at 67-75), that prosecution was a classic example of intimidation of a critical legislator by the Crown and of accountability before a hostile judiciary. This case was deemed so violent a breach of the free speech privilege that it was the principal cause of the exile of James II and of the codification of the free speech privilege in the English Bill of Rights. The decision was later condemned as a disgrace to the country and as "decided in the worst of times." *Rex* v. *Wright*, 8 Tr. 293, 101 Eng. Rep. 1396 (1799).

Certainly, no one would suggest that the notorious prosecution of Sir John Eliot in 1629, which led to the first comprehensive declaration of the privilege, can be resurrected as a precedent to narrow the scope of the free speech privilege. The real importance of the *Williams* case lies in the fact that it was "one of the immediate causes of the Revolution . . . [and] the occasion of one of the most important clauses in the Bill of Rights, and probably therefore of the like provision in the Constitution of the United States." C. H. McIlwain, *The High Court of Parliament and Its Supremacy*, 242 (1910). The *Williams* case, therefore, affords significant support to the position that publication of committee records is protected by the privilege.

9. The Solicitor General concedes that certain forms of publication are protected from judicial inquiry by the Speech or Debate Clause. He includes therein, to the exclusion of all other forms of publication, committee reports delivered to Members only, and the Congressional Record (Brief, at 40), because "they are the means Congress has selected for informing its membership about its business." Directly contrary to this assertion is the position of the United States Senate, which is more qualified to determine what methods of publication are necessary for its own processes:

> "One of these duties, important as any other, is the duty of informing other Members, constituents and the general public, on the issues of the day. This is done in many ways, most of which were not technically possible in 1789. Floor debate and belated newspapers reports were practically the only means available at the time of the founding. Now, there are many means of disseminating information: wire services, radio and television, telephone and telegraph, as well as floor debate, newspapers, books, magazines, newsletters, press releases, committee reports, the *Congressional Record*, and legislative services. In today's hectic and complicated world, the various methods of informing vary in effectiveness. Each Member must decide for himself from time to time which issues require ventilation and what methods to use. It is not for the Executive to challenge nor for the Judiciary to judge a Member's choice of issues to publicize or methods of publication regardless of whether they may be considered ill-advised." (Brief of Senate as *Amicus Curiae*, at 6.)

The doctrine of separation of powers and the principles of comity require that this determination by the Senate be

adopted by the courts. Otherwise, the courts will adopt for themselves the role of final arbiter of "the means Congress has selected" to inform itself and the electorate (Solicitor General's Brief, at 40).

10. The Solicitor General raises a red herring when he suggests the publication involved herein is somehow different for purposes of the privilege from publication done with official approval of the House (Brief, at 11). This suggestion should be dismissed for four reasons:

(a) At least since *Coffin* v. *Coffin*, 4 Mass. 1, 27 (1808), it has been settled that the privilege is personal to the legislator himself and does not depend on "whether the exercise was regular according to the rules of the house, or irregular and against their rules."

(b) The logic of the Solicitor General's argument is that the privilege would protect only Congressmen who are in accord with the majority's sentiment. In terms of importance to democracy, it may well be more important to protect a dissenter.

(c) If an act of a congressman is *ab initio* unrelated to the legislative process, a simple approval of the House cannot magically transmute a nonlegislative into a legislative act.

(d) In any event, even if the approval of the Senate is relevant in this case, the Senate *has* joined Senator Gravel in the assertion of the privilege in this instance of publication (Brief of Senate, at 6).

11. In his argument concerning the alleged lack of relationship of the publication of the Subcommittee record to the legislative process, the Solicitor General sets forth two "facts" which are unsupported in the record and which simply are not true.

(a) The Solicitor General asserts that the chairman of the parent committee "apparently recognized that the re-

publication was not necessary or appropriate to the proper performance of any legislative function, since he refused to authorize it" (Brief, at 42). When this assertion was made by counsel for the Internal Security Division in the District Court before the finder of fact, on the sole basis of an unsubstantiated and hearsay statement in a newspaper article, Judge Garrity refused to so find (App. 88-89). This "fact," even if true, would be irrelevant; but it just so happens, as Senator Dole stated on the floor of the Senate, that it is false. Cong. Rec. S. 4620 (daily ed., March 22, 1972).

(b) The Solicitor General also proffers the following "facts": "[The publication of the Subcommittee record] involved no supplying to the members of Congress of information that they needed in performing their legislative duties. The contents did not relate to any pending Congressional business. The material was neither the product of a Congressional hearing, nor something supplied to Congress to be considered in connection with pending legislative business" (Brief, at 41). There is not even a scintilla of support for these naked assertions in either the record of this case or in the opinions of the courts below. Were judicial notice to be taken about "Congressional business," it would be observed that, at the time of the Subcommittee hearing and of the publication of the record, the Senate was debating the Mansfield Amendment and other pending and potential legislation (*e.g.*, the draft and military appropriations bills) which relate directly to the contents of the Subcommittee record. Surely, the Solicitor General is not suggesting that the war in Vietnam is not the business of Congress.[7]

[7] The mere fact that the President saw fit to send the "Pentagon Papers" to Congress rebuts the very assertion of the Solicitor General that the contents of the Subcommittee record do not relate to pending Congressional business.

12. The Solicitor General has taken great liberties in his discussion of prior English and American precedents.

(a) While conceding that "certain republications of Parliamentary debate are now privileged" in England (Brief, at 47), the Solicitor General denies that earlier decisions holding to the contrary were repudiated. In this connection he cites language from *Wason* v. *Walter*, L.R. 4 Q.B. 73 (1868), which treats with approval part of the decision in *Stockdale* v. *Hansard*, 9 Ad. & E. 1, 112 Eng. Rep. 1112 (1839). But that part of *Stockdale* did *not* deal with whether the privilege encompassed publication; it dealt instead with the ruling that a resolution of one House is not binding on the courts. The court in *Wason* agreed with this ruling, but stated that it had "no application where the question is, not whether the act complained of, being unlawful at law, is rendered lawful by the order of the House, or protected by the assertion of its privilege, but whether it is, independently of such order or assertion of privilege, in itself privileged and lawful." *Wason, supra*, at 87, quoted in Solicitor General's brief, at 49. And the court had no trouble in concluding, on the basis of the informing function, that publication of legislative proceedings is "in itself privileged and lawful" because "it is essential to the workings of our parliamentary system, and to the welfare of the nation." *Id.*, at 95. (See Brief of Senator Gravel at 79-80.)

A third misstatement of fact by the Solicitor General, although of lesser importance, should be brought to the attention of the Court. The Solicitor General states that all 47 volumes of the Pentagon Papers were entered by Senator Gravel into the Subcommittee record and then published by Beacon Press (Brief, p. 3). In fact, however, Senator Gravel did not enter certain documents, including four volumes on negotiations, into the record; and, accordingly, they were not published. This same material also was not published in the Department of Defense's edition of the Papers, which was printed by the Government Printing Office.

The Solicitor General also appears to take some solace from the fact that *Stockdale* had been overruled by a statute, the Parliamentary Papers Act, 3 & 4 Vict., c. 9 (1840). Yet this act was passed by both the Commons and the Lords, the latter being the High Court of England, and the act declares that the *Stockdale* court misapprehended existing law, including, *e.g.*, *Rex* v. *Wright*, 8 T.R. 293, 101 Eng. Rep. 1396 (1799). The statute's effect is the same as if the House of Lords had reversed the King's Bench on a writ of error. (See Brief of Senator Gravel at 116-121.)

(b) The prior American cases cited by the Solicitor General do not hold "that the legislative privilege for speech or debate does not extend to republication" (Solicitor General's Brief at 49). The comments about "republication" in *McGovern* v. *Martz*, 182 F. Supp. 343 (D. D.C. 1960) were clearly *dicta* since there was no publication except in the Congressional Record; and even in *dicta*, the court suggested that a privilege, albeit qualified by a malice requirement, would apply to other publications. *Id.*, at 347. *Long* v. *Ansell*, 69 F. 2d 386 (D.C. Cir.) aff'd 293 U.S. 76 (1934) was not even a Speech or Debate Clause case; it involved a claim of a Senator that he was immune from service of process because of the privilege from arrest. The only reference to the free speech privilege is in *dictum* in a final, brief paragraph. *Id.*, at 389. On review, this Court did not even refer to the Speech or Debate Clause. 293 U.S. 76 (1934).

In *Hentoff* v. *Ichord*, 318 F. Supp. 1175, 1179 (D. D.C. 1970), the Court held that the Speech or Debate Clause deprived it of jurisdiction to entertain a complaint against congressmen "seeking any remedy" for the publication of a committee record. The Public Printer was enjoined under the doctrine of *Powell* v. *McCormack*, *supra*, because it was assisting in an action which threatened to violate individual constitutional rights. *Id.*, at 1180. See also

Hearst v. *Black*, 87 F. 2d 68 (D.C. Cir. 1936), and *Methodist Federation for Social Action* v. *Eastland*, 141 F. Supp. 729, 731 (D. D.C. 1956) (3-judge court), which dismissed, on principles of separation of powers, actions which sought to enjoin congressmen from publishing information in their possession.

13. We did not in our brief treat the Solicitor General's certified question as to whether congressional aides have a common law privilege to refuse to testify before a grand jury about publication of material introduced by their employers into an official subcommittee record, because we had difficulty understanding the precise thrust of the question and therefore preferred to see the Solicitor General's contention in his brief and deal with it in our reply brief.

However, the Solicitor General appears to deal with the question in three pages (at 52-54), without citation of any relevant authority. In particular, the Solicitor General has not explained how it is that those who assist the President have a privilege, apparently derived from the common law, to refuse to testify before congressional committees about the President's privileged conduct, but that those who assist a congressman do not have the same privilege to be free from interrogation by co-ordinate branches about the congressman's privileged conduct. We therefore feel that *certiorari* with respect to this issue should be dismissed as improvidently granted.

Should the Court nevertheless reach the merits of this question, Senator Gravel feels that there is nothing that he can profitably add to the arguments set forth by the Unitarian Universalist Association in its brief *amicus curiae* in this case (at 30-33), and Senator Gravel thus adopts those arguments. Senator Gravel does, however, re-emphasize his position that no common law privilege is here needed, where the privilege is explicitly set forth

in the Constitution, and this Court neither has to resort to implications nor has to fashion judicial substantive law.

Conclusion.

In conclusion, we join the United States Senate in urging this Court to hold that "[n]either Senator Gravel nor his aide should be required to testify before the Grand Jury, and no other witness should be permitted to testify as to the activities of the Senator or his aide." (Brief of Senate, at 21.)

Respectfully submitted,

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